2 - 2004_6 pt_1.fm Page 37 Monday, July 12, 2004 10:07 AM

Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–746 OF 2003
SURIYADI J
8 DECEMBER 2003

Civil Procedure — Locus standi — Want of authority — Defendants applied to strike out action for want of locus standi — Whether action scandalous, frivolous or vexatious or an abuse of court's process — Rules of the High Court 1980 O 18 r 19

Companies and Corporations — Derivative action — Fraud on the minority — Exceptions to the rule in Foss v Harbottle

The second, third and fourth defendants applied, inter alia, to strike out the plaintiff's action. The defendants relied on the grounds of lack of locus standi and that the action was scandalous, frivolous or vexatious and an abuse of the process of the court.

Held, dismissing the application with costs:

(1) On the issue of locus standi, it is imperative that the plaintiffs must be aggrieved persons and not mere busybodies, with a nexus existing between them and the fifth defendant, entitling them to file this action. For this issue, it is sufficient for the plaintiffs to show that they came within one of the exceptions to the rule in *Foss v Harbottle* (see para 26).

(2) Aggrieved shareholders who have no remedy may sue, where directors having de facto control of the affairs of the company had or had not used their powers in a manner that may benefit themselves, at the expense of the company. Control can come in many forms, and may be carried out in many ways especially by manipulations, deliberately to ensure that the company is prevented from taking up any action for its own benefit (see para 33).

(3) The plaintiffs had the requisite locus standi to initiate these proceedings by way of a derivative action based on the following: (i) the nexus had been established by their equal shareholding and directorships in the fifth company; (ii) they were aggrieved parties and certainly would lose much through the fifth company; and (iii) the plaintiffs had established that they came within one of the exceptions to the rule in *Foss v Harbottle* by virtue of the third and fourth defendants possessing equal shareholding and voting rights, capable of freezing everything in the process when they dragged their feet in confronting the issue of termination, merely accentuated the reality of their de facto control of the management. This finding pertaining to their refusal to act, which was a form of manipulation by itself, was beneficial to themselves through WSGSL at the expense of the fifth company and amounted to fraud against the plaintiffs (see para 38).

[Bahasa Malaysia summary

Defendan kedua, ketiga dan ke-empat memohon, antara lain untuk membatalkan tindakan. Defendan-defendan bersandar pada alasan ketiadaan locus standi

2 - 2004_6 pt_1.fm Page 38 Monday, July 12, 2004 10:07 AM

dan bahawa tindakan berkenaan adalah mengaibkan, remeh atau menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan dengan kos:

(1) Tentang isu locus standi, adalah penting sekali bahawa plaintif mestilah merupakan orang yang terkilan dan bukan semata-mata seorang penyibuk, dengan neksus yang wujud antara mereka dan defendan kelima, yang melayakkan mereka untuk memfailkan tindakan ini. Bagi isu ini, adalah memadai untuk plaintif menunjukkan bahawa mereka terletak di bawah salah satu kecualian kepada prinsip dalam kes *Foss v Harbottle* (lihat perenggan 26).

(2) Pemegang syer yang terkilan yang tidak mempunyai apa-apa remedi boleh mendakwa, jika pengarah-pengarah yang mempunyai kawalan de facto ke atas hal ehwal syarikat berkenaan telah atau belum menggunakan kuasa mereka itu mengikut cara yang boleh memberi manfaat kepada mereka sehingga menjejaskan syarikat. Kawalan boleh datang dalam pelbagai bentuk dan boleh dijalankan dalam pelbagai cara, terutamanya dengan manipulasi secara sengaja untuk menghalang syarikat daripada mengambil apa-apa tindakan untuk manfaatnya sendiri (lihat perenggan 33).

(3) Plaintif-plaintif mempunyai locus standi yang diperlukan untuk memulakan prosiding-prosiding ini melalui jalan tindakan terbitan berdasarkan hal-hal yang berikut: (a) neksus telah dibuktikan melalui persamaan dari segi pegangan syer dan kedudukan mereka dalam lembaga pengarah syarikat kelima; (b) mereka merupakan pihak-pihak yang terkilan dan sudah semestinya akan banyak menanggung kerugian menerusi syarikat kelima; dan (c) plaintif-plaintif telah membuktikan bahawa mereka terletak dalam salah satu kecualian kepada prinsip dalam kes *Foss v Harbottle* oleh sebab defendan ketiga dan ke-empat memiliki pegangan syer dan hak mengundi yang sebanding, berkeupayaan untuk membekukan apa saja perkara yang sedang diproses apabila mereka berlengah-lengah ketika berdepan dengan isu penamatan, semata-mata menonjolkan realiti sebenar bahawa mereka mengawal pengurusan secara de facto. Penemuan tentang keengganan mereka untuk bertindak, yang dengan sendirinya merupakan suatu bentuk manipulasi, mendatangkan manfaat kepada mereka sendiri menerusi WSGSL sehingga menjejaskan syarikat kelima dan merupakan fraud terhadap para plaintif (lihat perenggan 38).]

Notes

For cases on derivative action, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 119–124.

For cases on want of authority, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3977–3980.

Cases referred to

Abdul Rahim bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd [2000] 2 AMR 1319 (refd)

2 - 2004_6 pt_1.fm Page 39 Monday, July 12, 2004 10:07 AM

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)
American Cyanamid Co v Ethicon Ltd [1975] AC 396
Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors [1997] 2 MLJ 11 (refd)
Atip bin Ali v Josephine Doris Nunis & Anor [1987] 1 MLJ 82 (refd)
Attorney-General Malaysia, The v Chiow Thiam Guan [1983] 1 MLJ 51 (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)
Burland v Earle [1902] *AC* 83 (refd)
Caltex Oil Malaysia Ltd v Tee Than Song [1969] 2 MLJ 184 (refd)
Daniels v Daniels [1978] Ch 406 (refd)
Eastman Co (Kilner House) Ltd v Great London Council [1982] 1 All ER 437 (refd)
Fellows v Fisher [1975] 2 All E R 829 (refd)
Foss v Harbottle (1843) 2 Hare 461
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Lian Keow Sdn Bhd v Overseas Credit Finance Bhd [1982] 2 MLJ 162 (refd)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10 (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)
Mohamed bin Ismail v Tan Sri Haji Osman Saat & Ors [1982] 2 MLJ 133 (refd)
Paul Law Ung Hua & Anor v Hong Wei Organisation Sdn Bhd [1996] 4 MLJ 489 (refd)
Pavlides v Jensen [1956] Ch 565 (refd)
Pengiran Othman Shah bin Pengiran Mohd Yussof & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309 (refd)
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1980] 2 All ER 841 (refd)
Roslan bin Abdullah v New Zealand Insurance Co Ltd [1981] 2 MLJ 324 (refd)
Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (refd)
TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45 (refd)
Tan Eng Guan & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487 (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2003] 4 MLJ 332 (refd)
Ting Chong Maa v Chor Sek Choon [1989] 1 MLJ 477 (refd)
United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor [2001] 6 MLJ 511 (refd)
Wallersteiner v Moir (No 2) [1975] QB 373 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (2), O 29 r 1, 2(B), O 33 r 2
Specific Relief Act 1950

DP Naban (Ben Chan and Bahari Yeow with him) (Lee Hishamuddin) for the plaintiffs.
Vinayak Pradan (Ajit Kumar with him) (Watson Peters & Mohd Fuad) for the first defendant.
Raja Aziz Addruse (Christopher Leong, TS Lim and Kevin Wong with him) (Chooi & Co) for the second, third and fourth defendants.

2 - 2004_6 pt_1.fm Page 40 Monday, July 12, 2004 10:07 AM

Suriyadi J:

[1] On 2 September 2003, the plaintiffs had filed Civil Suit 22–746 of 2003 in the High Court of Malaya, in the registry of Shah Alam High Court. As per the writ of summons, they had alleged that they had brought the action in their capacity as shareholders, and for the benefit of Asia PGA Tour Limited, the fifth defendant. The statement of claim revealed that the fifth defendant had an authorized share capital of HK$1005 divided into 500 A shares of HK$1.00 each, 500 B shares of HK $1.00 each, and another five non-voting deferred shares of HK$1.00 each. In the fifth defendant, the first and second plaintiffs were registered shareholders of the A shares, each holding 49.9% and 0.1% of the aforesaid shares respectively. The second and third defendants were the registered shareholders of the B shares, each holding 49.9% and 0.1% of the shares respectively. The board of directors of the fifth defendant consist of four directors, comprising two directors from the A shares and two directors from the B shares comprising the third and fourth defendants but not the second.

[2] The first and fifth defendants had entered into two master rights agreement way back in 1 June 1994 and 7 May 2001 (hereinafter collectively referred to as 'the Master Rights Agreements'). Apart from the latter agreements, the contending parties and one other entity, ie Park House Holdings Ltd had entered into a joint venture agreement, whereat they had recorded the basis of their agreements, inter alia, the manner in which the business and affairs of the fifth defendant would be financed and conducted.

[3] In a gist, pursuant to the Master Rights Agreements the fifth defendant was to promote, organize and complete several major professional golf tournaments in Asia. As per the latter agreements, the fifth defendant was accorded several commercial rights, including the rights of advertisement, publication, sponsorship and video filming. To put into effect and to exploit the Master Rights Agreements, the first plaintiff due to its experience and professionalism, per an Agency Agreement dated 22 January 2003 was appointed by the fifth defendant as its sole representative worldwide. Pursuant to the interlinking agreements the fifth defendant had thereupon successfully attracted sponsors. The unpleasant news had arrived in the form of a letter dated 22August 2003 when the first defendant had purportedly terminated the Master Rights Agreements. The basis of the latter was that a conflict existed between the shareholders of the fifth defendant, compounded by the latter's failure to pay its debts as and when they fell due. The respond by the plaintiffs was the civil suit.

[4] In brief as per the statement of claim, the agreements could be terminated forthwith upon notice primarily on two grounds, namely, the fifth defendant being near insolvent or already insolvent, or had committed a material breach, which was not remedied within 28 days after receiving notice from the first defendant requiring remedy. The reasons supplied by the defendants for the termination therefore not only were not allowed by the agreements, but even if allowed, the required procedures had not been adhered to closely. As far as the plaintiffs were concerned the Master Rights Agreements thus were still

2 - 2004_6 pt_1.fm Page 41 Monday, July 12, 2004 10:07 AM

valid and subsisting. Being dissatisfied with the action of the first defendant of such purported termination, allegedly motivated by greed, illegality and mala fide, what with the other defendants being unwilling to stop the breach, the plaintiffs had filed the abovementioned suit.

[5] As said above, this suit could not be brought in the name of the fifth defendant, as the third and fourth defendants had allegedly refused to initiate the proceedings. From the point of view of the plaintiffs, by the refusal of the second, third and the fourth defendants who either collectively held equal shareholding powers or voting rights vis-a-vis the plaintiffs to initiate the proceedings, the defendants thus had failed to exercise due care and diligence, and had failed to act honestly and reasonably in the discharge of their duties. Likewise, the second defendant had failed in its duties and responsibilities to the plaintiffs as set out in the shareholders agreement between the parties.

[6] Prompt action had to be undertaken by the plaintiffs, as in the interim due to the wide publicity and announcements concerning the purported termination of the Master Rights Agreement, serious injuries to the goodwill and business reputation of the fifth defendant had occurred worldwide. Such purported termination not only had already caused several major terminations of sponsorship agreements, but also likely to cause further terminations of similar sponsorships.

[7] The plaintiffs' claim against the first defendant, which was for the benefit of the fifth defendant were for:

(i) a declaration that the purported termination of the Master Rights Agreements by the first defendant was illegal, null and void and or invalid in law and or of no effect;

(ii) a declaration that the Master Rights Agreements were still valid and subsisting;

(iii) specific performance of the Master Rights Agreements by the first defendant; and

(iv) other relief.

[8] On 2 September 2003, the plaintiffs initiated a drastic step by filing an ex parte summons in chambers under O 29(1), (2) of the Rules of the High Court 1980 praying for an interlocutory injunction to restrain the first defendant, whether acting by themselves, their directors, officers, servants or agents or any of them until final disposal of this action or until such further orders were issued by the court later. Under the above sub-provision, if it were urgent in nature, such an application could be made ex parte supported by an affidavit, which must contain clear and concise statement of the facts giving rise to the claim against the defendants, the facts giving rise to the claim for the interlocutory relief, the facts relied upon justifying the ex parte application including any notice given or the reason why none was given, the reply of the defendants in the claim or the injunction application, reasons that could defeat the injunction application, whether any previous similar ex parte application had been made and its outcome, and of course the precise relief sought in the injunction application.

2 - 2004_6 pt_1.fm Page 42 Monday, July 12, 2004 10:07 AM

[9] This interlocutory injunction was to restrain the defendants from: **A**

(i) making any publications or announcement in what ever form, that the Master Rights Agreements dated 1 June 1994 and 7 May 2001 had been terminated;

(ii) implementing or carrying into effect in whatsoever form the purported termination of the Master Rights Agreements; **B**

(iii) assigning or transferring any rights agreed upon in the Master Rights Agreements to any third party;

(iv) exercising or interfering with the commercial rights and/or benefits of the fifth plaintiff as contained in the Master Rights Agreements; **C**

(v) negotiating or entering with any third party any agreement with having the same or substantially the effects as the Master Rights Agreements; and

(vi) communicating, negotiating, contracting with sponsors (itemized in the application) successfully procured by the first plaintiff and the fifth defendants, pursuant to the Master Rights Agreements. **D**

[10] Apart from those prayers, the plaintiffs, inter alia, had prayed for an additional order that could assure the preservation of status quo, in respect of all the rights and obligations of the first and fifth defendants in the Master Rights Agreement pending trial. **E**

[11] The scope of an interlocutory injunction, and the circumstances of granting one, is set out in the Specific Relief Act 1950, with the procedures regulated by O 29 r 1 of the Rules of the High Court 1980 (*Janab's Key to Civil Procedure in Malaysia and Singapore*). Having heard the application, I had granted an injunction on an urgent (after having been convinced by a certificate of urgency) and ex parte basis on 5 September 2003 (see encl 11). I had granted the order, despite it being ex parte, as any delay occasioned by the notifying of the defendants could occasion irreparable damage to the plaintiffs' position (*Caltex Oil Malaysia Ltd v Tee Than Song* [1969] 2 MLJ 184; *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45; *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10*)*. Under the statutory provision of O 29 r 2(B), unless that injunction was revoked or set aside, perhaps based on the above two reasons of urgency and one sidedness, let alone it being a temporary measure, would automatically lapse at the end of 21 days from the date the order was granted. The successful applicant is statutorily required to serve on the relevant party the interim injunction order, within one week of it being granted. At the date of granting the order, the court must forthwith fix a date for inter partes hearing before the expiry of the 21 days. Frills aside, I had fixed 19 November 2003 for the inter parte application. **F** **G** **H**

[12] To retrace slightly, I had granted the ex parte application as I had found some prospect of success, though not necessarily certainty in their claim, subsequently. Needless to say, this conclusion of prospect came about after I had satisfied myself that there existed a serious question to be tried. Even though no application was filed to set aside that interlocutory order, and hence **I**

2 - 2004_6 pt_1.fm Page 43 Monday, July 12, 2004 10:07 AM

unnecessary to identify with precision the evidence or the reasons justifying my granting of the order, for the sake of better appreciation of the problem at hand, and similarly relevant to the current striking out action, it would not do any harm if I pen in brief one contentious matter connected to the serious question as an illustration (*Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; *Fellows v Fisher* [1975] 2 All ER 829). It would appear as alleged that the fifth defendant had already collected in the minimum USD15m from sponsors, and legal complications looming was a potential reality, unless the rot was stopped in its track. The reasons for the termination by the first defendant were open to several interpretations, as there was also evidence found in the statement of claim that pointed to the first defendant wanting to handle all sponsorships, commercial and sanctioning issues related to the Asian PGA Tour in-house. In other words, the first defendant had wanted to pull the rug under the feet of the fifth defendant, and rake the lucrative profits of the activities of the latter, hence the allegation of avarice on the part of the first defendant.

[13] Having arrived at that conclusion, ie that there was at least one serious factual question to be tried, I had subsequently proceeded to consider whether the remedial damages that could be obtained by the plaintiffs, if successful later, would be adequate to compensate any potential irreparable damage. If they could be adequately compensated, I would have rejected the application. I had not stopped short there, as I had to consider the question of, what if after the injunction had been granted the defendants were to eventually emerge the successful party? If the plaintiffs could not be adequately compensated, but the defendants could, there was thus justification in its granting. As I was fully convinced at that interlocutory stage that the plaintiffs would not be adequately compensated if successful later, and the defendants would be if the opposite result were to materialize, I had accordingly stopped there. Naturally if I had doubts as to the adequacy of the remedy to either party, I would have had to focus on the factor of balance of convenience, whether it favoured the granting of the order or otherwise.

[14] To wind up the reasons for my ex parte order, with justice as the final product after considering all the relevant factors, special or otherwise, and after weighing the harm the injunction would produce if granted, as against the harm that would ensue from its refusal, I had not shirked from granting 'order in terms' (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396).

[15] As the second, third and fourth defendants had filed a pre-emptive action vide encl 18, praying that the second and third defendants be permitted to enter conditional appearance, and that the second, third and fourth defendants be permitted to file a striking out action against the writ to be served outside jurisdiction, and or against the amended summons to be served outside jurisdiction within fourteen days in the event conditional leave were to be granted, the injunction application took a back seat.

[16] A perusal of the skeletal written submission and oral submission of the defendants showed that the defendants had meticulously avoided the specific usage of the provisions of O 18 r 19 or O 33 r 2 of the Rules of the

2 - 2004_6 pt_1.fm Page 44 Monday, July 12, 2004 10:07 AM

High Court 1980 during the hearing. The reasons were quite obvious as the defendants had adverted in a large way to the affidavit evidence, which included exhibits enclosed in it. In fact the defendants were quite coy in identifying the specific provision, when they had painstakingly avoided mentioning any, and consistently alluding to the singular argument that this derivative action was flawed premised on want of locus standi. Order 33 r 2 could not have been the provision in their minds, as apart from refraining to mention it, and even if they had wanted to allude to it, that would have been disallowed as there was total failure of compliance with the statutory procedures before permitted to be invoked.

[17] To invoke O 18 r 19(1)(a) of the Rules of the High Court 1980 would have been debilitating to the case of the defendants, as O 18 r 19(2) in crystalline terms provide that no evidence shall be admissible on an application under para (1)(a). That being so parties must only depend on the available statement in the pleading and nothing else. That being so no attention is to be given to the affidavits and the contents or accompanying exhibits (*Abdul Rahim bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd* [2000] 2 AMR 1319). In *Paul Law Ung Hua & Anor v Hong Wei Organisations Sdn Bhd* [1996] 4 MLJ 489, Abdul Kadir Sulaiman J in no uncertain terms had occasion to reiterate that no evidence shall be admissible, with the court required only to consider the pleadings for the purpose of determining whether the statement disclosed no reasonable cause of action or otherwise.

[18] Without the right of allusion to the evidence in the affidavits, the position of the defendants would have been untenable. Without them the scenario would have tantamount to the one-sided bare allegations in the summons in chambers vis-a-vis the assertions in the statement of claim. Perhaps with that in mind it was not surprising that the defendants had religiously avoided mentioning this striking out provision. Despite this subtle approach I was not sidetracked, as during the hearing I realized that the documented prayers in the summons in chambers unfolded a different story, in that they were in total contrast to the stance in court. A scrutiny of the application showed that the grounds for the striking out action were two folds, namely:

(i) the plaintiffs had no right or locus standi to initiate the proceedings as mere shareholders of the fifth defendants; and/or

(ii) this application was scandalous, frivolous or vexatious or otherwise an abuse of the process of the court.

[19] At no stage of the hearing did the defendants apply that the second prayer be deleted, an act which invariably would have left only the issue of locus standi standing, and in the process strengthening their approach. Having made the necessary comparisons between the prayers in the summons in chambers with the provisions of O 18 r 19(1), and despite the defendants' aversion to identify the specific provision, I could not but come to the conclusion that the defendants striking out application fell squarely within the latter provision. As far as I was concerned, a rose was still a rose by whatever name one called it or for that matter did not name it.

2 - 2004_6 pt_1.fm Page 45 Monday, July 12, 2004 10:07 AM

[20] The application per se was not intrinsically flawed, as procedurally the invocation of the summary application under O 18 r 19 of the Rules of the High Court 1980 for purposes of this case, was perfectly in order (*Roslan v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324; *Alor Janggus Soon Seng Trading Sdn Bhd* & Ors *v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241). In the latter case of *Alor Janggus Soon Seng Trading Sdn Bhd,* an interlocutory injunction was successfully applied for by the appellant to restrain the company from transferring the shares to the purchasers, on the ground of fraud on minority shareholders. The shareholders had lost out when the same judge had set the order aside, resulting in an appeal being filed. The central issue canvassed before the then Supreme Court was, whether the respondent defendant should have raised a preliminary objection regarding the shareholders lack of locus standi, or apply to strike out the application. At the end of the hearing, the minority shareholders argument prevailed and the appeal was allowed. In his judgment, Jemuri Serjan CJ (Borneo) as regards the correct procedure had opined:

> The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O 18 r 19 or O 33 r 2 of the Rules of the High Court ('the RHC') because if they succeed in their applications on any of these orders the civil suit and the injunctions itself would both collapse. *We would demonstrate why invocation of O 18 r 19 or O 33 r 2 is the correct procedure by reference to authorities.* (Emphasis added.)

[21] It must be borne in mind that the court must not summarily dismiss the writ if it were not such a plain and obvious case. So long as the action disclosed some cause of action or raise some question fit to be decided by the court, the mere fact that the plaintiffs was unlikely to succeed at the trial was no ground for striking it out (*The Attorney-General Malaysia v Chiow Thiam Guan* [1983] 1 MLJ 51). In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court had held:

> It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L& NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence.

[22] Even though the defendants should be denied the right to allude to the evidence in the affidavits, but as I, for some good reason or other had allowed their usage from the earliest of stages, in the interest of justice I had decided to continue the practice. To even things out I had also permitted the plaintiffs to allude to the evidence. No doubt if the defendants had succeeded in disclosing disputable facts which neutralized the plaintiffs' case completely, or the issue of law was unsustainable or unarguable, then the striking out action would have been granted (see *Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 MLJ 11; *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 2 MLJ105; *Pengiran Othman Shah bin Pengiran Mohd Yussof & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309).

2 - 2004_6 pt_1.fm Page 46 Monday, July 12, 2004 10:07 AM

[23] With the striking out application thrust at me to be adjudicated, Iinvariably had to reopen the case and assess whether an unsustainable case existed. In *Sim Kie Chon v Superintendant of Pudu Prison & Ors* [1985] 2MLJ 385, Abdul Hamid CJ (Malaya) had occasion to ventilate:

> The principle governing the striking out of pleadings is clear in that it is only in *plain and obvious cases* that recourse should be had to the summary process under O 18 r 19 of the Rules of the High Court 1980.

[24] Regardless of the terminologies adverted to, namely a 'sustainable case existed' or that 'the case was not plain and obvious to be struck out, which principally means about the same things, it could be stated that if I had found during the ex parte application a serious question to be tried, establishing that a sustainable case existed is it not logical to stand firm by my previous stance and not reverse it? To be frivolous, amongst others, is to be flippant, shallow or trivial whilst to be vexatious includes being bothersome, harassing, tiresome or wearisome. On that premise, as I had found a serious question to be tried earlier, the matter before me thus could not have been flippant or wearisome to say the least unless proven otherwise at the end of the application by the defendants in this inter party striking out application. In a related matter, in *Lian Keow Sdn Bhd v Overseas Credit Finance Bhd* [1982] 2 MLJ 162, even Salleh Abbas FJ had likened serious question to an action that was not frivolous or vexatious.

[25] To reiterate, this striking out action application as reflected by the summons in chambers was grounded, amongst others, (apart from the issue of locus standi which shall be dealt with later) on it being scandalous, frivolous or vexatious or otherwise an abuse of the process of the court. Therefore if I were to conclude that this action was indeed that, I could only justify my previous flawed stance by reasons of inadequacy of research and want of assistance from the other contending parties. Regardless of the uncomfortable predicament I was in, I had not hesitated in sifting the evidence again and adjudicating whether there was any justification in the defendants' application.

[26] Perusing the application, I was aware that the first ground was on the issue of want of locus standi on the part of the plaintiffs, which inevitably meant that if the defendants were to succeed on this point alone, the second ground naturally would be superfluous. On that logic, it would also naturally flow that my interlocutory injunction obtained ex parte would have been flawed. On this issue of locus standi, it is imperative that the plaintiffs must be aggrieved persons and not mere busybodies, with a nexus existing between them and the fifth defendant, entitling them to file this action *(Mohamed bin Ismail v Tan Sri Haji Osman Saat & Ors* [1982] 2 MLJ 133; *Atip bin All v Josephine Doris Nunis* [1987] 1 MLJ 82), For purposes of this issue of want of authority, the moment the plaintiffs successfully prove that they fall within one of the exceptions to the principle of *Foss v Harbottle* (1843) 2 Hare 461, they would be home and dry. Needless to say if the plaintiffs were to succeed, it would inevitably mean that they had proven the nexus and all the ingredients entitling them to initiate the action.

2 - 2004_6 pt_1.fm Page 47 Monday, July 12, 2004 10:07 AM

[27] Before delving into the case of *Foss v Harbottle* and its importance in some depth, it would be helpful if I were to discuss briefly its background. A company has two primary organs, namely the board of directors and the general meeting, each with distinct powers. In the running of the company it is trite and inevitable that the majority rule will prevail, adverting to resolutions to advance their will, and in the process perhaps ignoring or overlooking the interest of the minority shareholders. It is the law that the majority must act bona fide in the interest of the company, with such violation generally referred to as fraud on the minority. This expression 'fraud on a minority' is a term of art and has no relationship with the common law term of fraud or deception *(Abdul Rahim bin Aki v Kerubong Industrial Park* [1995] 3 MLJ417).

[28] It is from this trite law that laws pertaining to the protection of the minority interests evolved, hence the relevancy of this authority, ie *Foss v Harbottle* for purposes of this application. At the trial of the latter case it was established that, a minority shareholder who had no remedy, could sue where directors had used their powers, intentionally or unintentionally, fraudulently or negligently, in a manner that benefited themselves at the expense of the company. Due to the constant allusion by aggrieved parties of this case, the scope of its usability expended, resulting in court's recognition of certain exceptions, amongst them, of fraud being committed on the minority, the act being illegal or ultra vires, the existence of infringements of personal rights, special majorities being prescribed and the all enveloping justice of the case. This concept of permitting a minority action grounded on the concept of the justice of the case was canvassed and expended by Vinelott J in the case of *Newman Industries v Prudential Assurance* [1981] Ch 257, at p 327 endorsed subsequently by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] 1 Ch 204.

[29] In *Burland v*Earle (1902) AC 83), Lord Davey had opined that the cases in which the minority could maintain such an action were confined to acts, which were of a fraudulent character or beyond the powers of the company. If the acts when done by the majority were regular, and within the powers of the company, with the intention clear then the minority would be disentitled from suing. Krishnan Arjunan in *Company Law in Malaysia Cases and Commentary* in lucid terms at p 358 had occasion to author:

> … courts will not generally interfere with irregularities in internal management of a company; … . In other words, if an irregularity could be regularized by ratification in the general meeting by the majority of the shareholders, there would in fact be no wrong done to the company, and consequently, no minority shareholder could bring an action.

[30] In a gist, for the plaintiffs to succeed they must bring the case within the exceptions, and not to fall within mere irregularities in the internal management of a company.

[31] I now take the extra mileage and restate that once the case comes under one of the exceptions, three forms of action may be undertaken, namely a personal action, a representative action or derivative action. In the first two, an aggrieved member will attempt to enforce a personal right wrongly denied

2 - 2004_6 pt_1.fm Page 48 Monday, July 12, 2004 10:07 AM

by the company, with the company as the real defendant. In a derivative action 'the aggrieved minority member' will attempt to rectify the wrong done to the company, on behalf of himself and the other members, except the wrongdoer *(Daniels v Daniels* [1978] Ch 406; *Wallersteiner v Moir (No 2)* [1975] QB 373; *Pavlides v Jensen* [1956] Ch 565; *United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor* [2001] 6 MLJ 511*)*. The court in *Prudential Assurance v Newman Industries* at p 210 had occasion to state the meaning of a derivative action in this manner:

> A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and fundamental to any rational system of jurisprudence. The rule in *Foss v Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the court to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of the company in general meeting. We are not concerned with this aspect of the rule.

[32] The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaetio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.

[33] The case of *Eastman Co (Kilner House) Ltd v Great London Council* [1982] 1 All ER 437 subsequently expended the precept that in the event the court found the directors having refused to permit the action being brought in thename of the company, it would allow the complaining shareholder (orshareholders), to initiate it in their own capacity against their own directors and the company. Without having to dissect and discuss case by case of recent developments, as regards the test of a derivative action's application, suffice

2 - 2004_6 pt_1.fm Page 49 Monday, July 12, 2004 10:07 AM

if I state that the minority, equal or majority shareholding status position, has in a large way been overshadowed by the concept of who is in *de facto control* of the management. In brief, aggrieved shareholders who have no remedy may sue, where directors having de facto control of the affairs of the company had or had not used their powers in a manner that may benefit themselves, at the expense of the company. Control can come in many forms, and may be carried out in many ways especially by manipulations, deliberately to ensure that the company is prevented from taking up any action for its own benefit. A specific example of a party in control is when despite the contesting parties having equal shareholding power, one of them is strengthened by say, a managing director with a casting vote. The other party which is less fortunate must be treated as being under the same disability as a minority shareholder. Once these recalcitrant directors have not lived up to their sworn duties it is my view that, even if it comes in the form of deliberate apathy, that derivative action may be resorted to. As an analogy, the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] 1 Ch 204 at p 219 in ringing terms had opined:

> It is commonly said that an exception to the rule of *Foss v Harbottle* arises if the corporation is 'controlled' by persons implicated in the fraud complained … But the proposition leaves two questions at large, first, what is meant by 'control' which embraces a broad spectrum extending from overall absolute majority of votes at one end, to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting as a result of influence or *apathy*. (Emphasis added.)

(On this point see also *Ting Chong Maa v Chor Sek Choon* [1989] 1 MLJ 477; *Tan Eng Guan & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487; *Tan Kwor Ham v Pengurusan Danaharta Nasional Bhd* [2003] 4 MLJ 332; *Barrett v Duckett & Ors* [1995] 1 BCLC 243).

[34] Edgar Joseph Jr J in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1991] 4 CLJ (Rep) 74 at p 84 had occasion to endorse the view of *Prudential Assurance Co Ltd v Newman Industries Ltd* when His Lordship had remarked:

> The Court did, however accept that 'control' does embrace a broad spectrum of positions within a company and that control could arise as the *result of indifference or apathy*. (Emphasis added.)

[35] In the current case even though the shareholders of team A and B held equal shareholding strength, the proactive and initiating party which had reneged on the Master Rights Agreements, leaned more heavily towards the B team. As gauged from the pleadings the third defendant who represented team B in the Board of Directors together with the fourth defendant, also another director, had curiously dragged their feet when requested to stop the first defendant from terminating the impugned agreements. Even though the nexus between the third and fourth defendants and the first defendant was yet to be effectively established, though not necessary, their inaction despite the protestations of team A caused some consternation with the court. Both had differing explanations during this relevant period of alleged inactivity hence requiring some attention. The second, third and fourth defendants had ventilated that indisputably the letter purporting to terminate the Master

2 - 2004_6 pt_1.fm Page 50 Monday, July 12, 2004 10:07 AM

Rights Agreements was received on 22 August 2003. A meeting was held on 29 August 2003 whereupon all parties had discussed and deliberated on how the fifth defendant should respond to the latter letter. The meeting ended only with the parties disagreeing on the contents and wording of the draft letter to be issued to the first defendant. The third defendant had also requested for time to seek out the advice of London solicitors. The plaintiffs vide a letter of the same date had agreed to await a reply from the third and fourth defendants by the start of business, London time (about 4pm on 2 September 2003). In spite of that indulgence to await the reply from the defendants, the plaintiff had filed the derivative action on the said 2 September 2003 which must have been before 3pm. In other words according to the defendants, not that they were apathetic but the plaintiffs had not been patient enough, and had gone against their own words. The plaintiffs had a different version. After receipt of the termination letter, and despite the demands of the plaintiffs that the termination be abrogated, the above draft letter in the meeting never reflected those wishes. It did not in any way protect or preserve the rights and interest of the fifth defendant. At the said Board of Directors meeting of 29 August 2003, the B team was unwilling to commence immediate legal proceedings against the first defendant, with the subsequent letters which were exchanged not making any difference. With the fifth defendant in the meantime losing money and goodwill around the globe, and the plaintiffs unwilling to wait further, the filing of the derivative action was a justifiable recourse. On the premise of the above different construction of the situation, how could I not conclude that this case warranted a full trial, as a minute examination of the evidence and their differing views at this stage would result in an over kill and unnecessary.

[36] Apart from the above factual differences, the documentation at para 65(a) of the statement of claim, where allegations were made that the fourth defendant was in complicity with one Ramlan, the executive director of the first defendant, the assertion that the third defendant had wished the first defendant well at para 65(d) following the purported termination of the Master Rights Agreement merely cast a further dark shadow over their inactions. To make matters worse, under para 65(j) it was pleaded that even though the fifth defendant was the promoter of the Macau Open, some individual had informed the Macau Sports Development Board that the fifth defendant no longer had the right to run that sporting event. Due to this information the fifth defendant was substituted by another promoter, ie World Sport Group (Singapore) Pte Ltd ('WSGSL'). Interestingly enough, as stated in the statements of claim not only the third and fourth defendants were shareholders, but also directors in WSGSL. If WSGSL stood to gain as the promoter of the Macau Open after replacing the fifth defendants, surely it would have been in the interest of these two defendants to remain silent and not propagate the interest of the fifth defendant. Their inaction surely speaks volumes of their real intention, ie to benefit themselves through WSGSL, at the expense of the fifth defendant.

[37] Even if there was no connection between the directors of team B with the first defendant (and as said earlier that there was no necessity there must

2 - 2004_6 pt_1.fm Page 51 Monday, July 12, 2004 10:07 AM

be one), but by virtue of their equal strength, clothed with directorship duties and power, they were unequivocally equal partners with team A's directors. In the event the directors of team B desired to stop any resolution or action, as exemplified in this case by their resolute action or inaction, they could do so. With such intangible but real power in hand, they were every bit in control of the affairs and destiny of the fifth defendant hence having de facto control of the management.

[38] Having sifted the evidence it was inevitable that I conclude that the plaintiffs had the locus standi to initiate this proceedings vide a derivative action, primarily founded on the following factors:

(i) the nexus had been established by their equal shareholding and directorships in the fifth company;

(ii) they were aggrieved parties and certainly would lose much through the fifth company; and

(iii) the plaintiffs had established that they came within one of the exceptions to the rule of *Foss v Harbottle*. By virtue of the third and fourth defendants possessing equal shareholding and voting rights, capable of freezing everything in the process when they dragged their feet in confronting the issue of the termination, merely accentuated the reality of their de facto control of the management. This finding pertaining to their refusal to act, based on sustainable grounds, which was a form of manipulation by itself, was beneficial to themselves through WSGSL at the expense of the fifth company. In a gist there was fraud committed against the plaintiffs.

[39] Despite the vehemence of the defendants' submission of whether the defendants had indeed refused to take up the cudgel on behalf of the fifth defendant, or had simply dragged their feet, or had wanted more time primarily to obtain legal advice, vis-a-vis the views and stance of the plaintiffs must be left to a full trial. As I already have made mention of this matter earlier, it is not necessary for me repeat it except to add that if I were to launch into a full dress hearing at this summons in chambers stage, so as to get to the bottom of things, then I might as well bypass and ignore O 34 of the Rules of the High Court 1980 and other relevant provisions laboriously provided for by Parliament, Without further ado, certainly this was not the right forum, as the purpose of this interlocutory hearing was merely to conclude whether this case was sustainable or otherwise. On the other hand 1 must hasten to add that as the defendants had filed this striking out application, it was incumbent upon them by *the end of the hearing* to convince me on a balance of probability that the case of the plaintiffs was unsustainable, and that the application be allowed. The consequential effect would be that the writ must be struck out.

[40] If I were to acquiesce to the line of thinking of the defendants, whereat they had focused their energy only on one issue, ie on the issue of locus standi, and I conclude that the plaintiffs indeed had that authority to initiate the derivative action the application without more should be dismissed. In a roundabout way too, I recognized the fact that the grounds of locus standi and the case being scandalous, frivolous or vexatious or otherwise an abuse

2 - 2004_6 pt_1.fm Page 52 Monday, July 12, 2004 10:07 AM

of the process of the court were inextricably linked to each other an should be dealt with simultaneously. This is so as, eg if the plaintiffs were not to have the authority then plainly the action was frivolous, vexatious or otherwise an abuse of the process of the court. On the other hand, as I had at the opening stage decided that the defendants' action fell under O 18 r 19 of the Rules of the High Court 1980, I had to follow through and decide on the second ground after being satisfied that the plaintiffs indeed had the locus standi.

[41] Without the necessity of detailing out the relevant evidence and justifying my reasons, suffice if I state that after having scrutinized and having considered the evidence a second time, the defendants still had failed to rebut the initial ex parte interlocutory injunction finding. And this was despite the proceedings being held inter parte. Touching only on one issue, I certainly was hard-pressed to be convinced that the reasons for the termination were legal and proper, when the grounds provided for in the Master Rights Agreements could also be construed differently. On that score, if the parties had differed in their interpretations pertaining to the circumstances when a termination was permitted, a triable issue inevitably exists which must warrant a full trial.

[42] With the failure of the defendants, either to prove the plaintiffs' want of authority or the action as being scandalous, frivolous or vexatious or otherwise an abuse of the process of the court, I therefore had no hesitation in dismissing this application with costs.

Application dismissed with costs.

Reported by Eugene Jayaraj